SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5051-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KESHAUN D. EARLEY, a/k/a
KESHAWN EARLEY, KESHAWN EARLY
and BUDDHA EARLEY,

Defendant-Appellant.

Argued February 8, 2017 – Decided March 17, 2017

Before Judges Simonelli, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos. 11-04-0827, 11-09-2163 and 13-03-0858.

Elizabeth C. Jarit, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Jarit, of counsel and on the briefs).

John J. Santoliquido, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Diane Ruberton, Acting Atlantic County Prosecutor, attorney; Mr. Santoliquido, of counsel and on the brief).

PER CURIAM

On August 26, 2012, defendant Keshaun D. Earley was arrested and charged with the shooting death of James Jordan. An Atlantic County jury thereafter found defendant guilty of first-degree murder, N.J.S.A. 2C:11-3a(1) and (2) (Count One); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4a (Count Two); and second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b (Count Three). Defendant filed post-trial motions to dismiss the indictment and for a new trial, which the court denied. On May 6, 2014, defendant was sentenced on the murder conviction to a forty-year prison term with an eighty-five-percent parole ineligibility period pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2(a). The court merged Count Two with the murder conviction, and imposed a concurrent seven-year prison term on Count Three.

In this appeal, defendant raises the following issues for our consideration:

> POINT I
>
> THE STATE'S DESTRUCTION OF OVER 200 HOURS OF POTENTIALLY EXCULPATORY SURVEILLANCE FOOTAGE RELATING TO EARLEY'S ALIBI REQUIRES REVERSAL OF EARLEY'S CONVICTIONS
>
> A. Because Earley's due process rights were violated, the court erred in denying his motion to dismiss the indictment

1. Under the New Jersey Constitution, bad faith is not a prerequisite to finding that a defendant's right to due process has been violated

2. Alternatively, the trial court erred in its bad faith analysis and incorrectly focused on the nature of the charges in its decision to deny the defendant's motion

B. The doctrine of fundamental fairness independently requires dismissal of the indictment

C. The jury instruction provided by the court was insufficient to cure the discovery violation, requiring reversal and a remand for a new trial

POINT II

EARLEY'S RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND AN IMPARTIAL JURY WERE VIOLATED BY THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. (Raised by the judge)

POINT III

THE TRIAL COURT'S CONCLUSION THAT THE IDENTIFICATION PROCEDURES WERE NOT SUGGESTIVE, DESPITE THE FACT THAT THE POLICE VIOLATED NEARLY ALL OF THE ATTORNEY GENERAL GUIDELINES, WAS ERRONEOUS AND DENIED EARLEY DUE PROCESS AND A FAIR TRIAL

POINT IV

THE JURY INSTRUCTION ON IDENTIFICATION, WHICH OMITTED MOST OF THE SYSTEM VARIABLES, COULD NOT HAVE ADEQUATELY EXPLAINED THE RELEVANT FACTORS OF ASSESSING THE RELIABILITY OF THE OUT-OF-COURT IDENTIFICATIONS

POINT V

EARLEY'S RIGHT TO CONFRONTATION, AS WELL AS OUR HEARSAY RULES, WERE VIOLATED BY THE ADMISSION OF STATEMENTS BY THE POLICE THAT THEY HAD ADDITIONAL WITNESSES AND EVIDENCE, NOT PRODUCED AT TRIAL, INCULPATING THE DEFENDANT. (Not raised below)

POINT VI

THE PROSECUTOR'S COMMENTS DURING SUMMATION ON THE DEFENDANT'S FAILURE TO PROVE HIS INNOCENCE AND ON HIS POST-ARREST SILENCE VIOLATED EARLEY'S STATE PRIVILEGE AGAINST SELF-INCRIMINATION AND DENIED HIM DUE PROCESS AND A FAIR TRIAL

POINT VII

THE CUMULATIVE IMPACT OF THE ERRORS DENIED EARLEY DUE PROCESS AND A FAIR TRIAL

POINT VIII

BECAUSE THE COURT ENGAGED IN IMPERMISSIBLE DOUBLE-COUNTING IN FINDING AGGRAVATING FACTORS ONE AND TWO, A REMAND IS REQUIRED FOR RESENTENCING

For the reasons that follow, we reject the arguments challenging defendant's conviction. We remand for the court to re-sentence defendant without consideration of aggravating factors one and two, N.J.S.A. 2C:44-1(a)(1) and (2).

I.

Shortly before noon on August 26, 2012, Nicole Jones was preparing to cook breakfast for a group of relatives and friends in her Carver Hall apartment on Absecon Boulevard in Atlantic

City. Jones sent Kevin Brown and an individual nicknamed "Meat" to buy food for the breakfast at the nearby High Gate apartment complex.

When the two men returned, they were approached outside Carver Hall by Jordan, who was Jones's nephew. As Brown spoke with Jordan, "[defendant] . . . came from around the corner" with "a shirt tied around his face," which prompted Brown to ask Jordan "who was that[?]" When Jordan "blew [] off" his question, Brown "started backing off" because he thought he was being set up. The white tee shirt initially prevented Brown from recognizing the gunman. Brown then saw the man fire one shot, striking Jordan. As Brown was still backpedaling, he saw the suspect's face after he dropped the gun, reached down for it, and the tee shirt fell from his face.

Brown ran into a nearby building, where he met Jones "a couple minutes after everything happened." Brown told Jones "it was Buddah"[1] who shot Jordan. Brown testified he knew defendant prior to the shooting because they had been "incarcerated a couple of times" together, and he had "seen him [on] the streets a couple of times," even though defendant "[didn't] hang out in that area."

[1] Defendant's nickname, Buddah, alternately appears as Buddha in various portions of the record.

When the shooting occurred, Jones was talking to her other guests in front of a window in the living room of her apartment. Jones testified that, after hearing the shot, she looked out the window and saw: "Budd[ah] dropped the gun, and when he went down to pick it up, he had a towel or like a shirt over his head that fell." She described the shooter, who she identified as Buddah, as "ha[ving] brown skin, kind of tall, skinny," and wearing "a white short-sleeve shirt [], some blue jeans," with something white hanging from his head. At the same time, Jones's friend, Ny-Taijah Ceasar, also yelled "that's Budd[ah], that's Budd[ah]." Jones testified she recognized the suspect as Buddah before Ceasar began shouting.

Before Jones went to the police station, she made phone calls in an attempt to ascertain Buddah's true identity. Jones testified she knew Buddah because "I seen him around a few times," and "[h]e came to my house like two times." She later testified she was not acquainted with defendant but had seen him at Carver Hall about three times in the two or three months before the shooting. According to Jones, Buddah "put the towel on his head" after it fell off before retrieving the black handgun. Jones saw Brown and Jordan, who she did not know had been shot, run from the scene. She also saw Buddah run behind the building and out of her view

before reappearing and running across Absecon Boulevard and the Brigantine connector road to a field on the other side.

Ceasar testified that she had been friends with defendant for several years at the time the shooting occurred. On that day, he was wearing "shorts, army fatigue material with a white shirt and a white shirt over his face." Ceasar stated she was looking out the window before the shooting and saw Buddah approach Brown and Jordan and then shoot Jordan. She observed: defendant had the gun in his hand as he approached; he shot the victim once; his shirt fell off his face for less than ten seconds; he picked the shirt and gun up; and ran across the highway. As this occurred, she yelled out the window, "oh my God, that's Budd[ah]."

Nina Brooks also heard the gunshot and called 911. She reported that the suspect ran across the street after the shooting. Ceasar described the shooter as a tall, African-American male who was wearing a white tee shirt, a white towel on his head, and grey shorts. She also reported hearing a female resident from the second floor run out yelling "it's Buddah."

The shooting was captured on a Carter Hall surveillance camera and the video was retrieved by police. Neither the gun nor any ballistics evidence was recovered. The State's forensic pathologist conducted an autopsy and testified that Jordan died from a gunshot wound to his chest.

Jones, Ceasar, and Brown all informed the police that defendant shot Jordan. Subsequently, police presented them with a photograph of defendant, and each positively identified him as the shooter.

Sergeant Kevin Ruga of the Atlantic County Prosecutor's Office (ACPO) testified that on the day of the shooting, he was part of a surveillance team stationed at Oakcrest Estates in Mays Landing to locate defendant. Defendant did not stop when instructed to by the officers. Instead, he ran through the woods and into an apartment where his girlfriend resided. The officers discovered defendant "lying in the bed [on] the third floor with the covers pulled up to his head," while "wearing a white tee shirt and some sweatpants."

After his arrest, defendant waived his Miranda[2] rights and agreed to speak with the investigating officers. Initially he insisted, "I was in Mays Landing all day. You look at them cameras [and] you'll see me out there all day . . . . I was never in Atlantic City today." He also stated, "if you talking about what happened today my aunt called me and told me that the boy got killed around Carver Hall." Later in the questioning, defendant

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

admitted he left Mays Landing with April Tobias in Tobias' Jaguar and traveled to Pleasantville to pick up his daughter around 2:00 p.m. Ultimately, defendant admitted he went to Atlantic City after 2:00 p.m. to pick up his daughter, and then immediately left and went to Pleasantville.

ACPO investigators also recovered surveillance video footage from Oakcrest Estates. Sergeant Richard Johannessen of the ACPO's Computer Crimes Unit explained that he utilized an external hard drive to store recorded footage from eighteen cameras at Oakcrest Estates between noon and midnight on August 26, 2012. Johannessen transferred this footage onto a hard drive on August 29, 2012, and provided the hard drive to the lead case detective, Sergeant Lynne Dougherty, the next day. Dougherty testified she reviewed the Oakcrest Estates surveillance video footage. In doing so, she focused on the period from noon "until we see [] defendant leaving the car, which is about 12:43ish." She explained that defendant claimed to have been at Oakcrest Estates at the time of the homicide, and she therefore specifically looked for defendant within that timeframe.

In response to a July 3, 2013 defense request to view the video discovery, Dougherty instructed Sergeant Matthew Paley of the Computer Crimes Unit to extract two portions totaling thirty minutes out of the total 215.5 hours of video footage from the

eighteen cameras. She testified: "[o]ne camera was 12:20 to 12:40 [p.m.] that was camera [six], and then camera [twenty one] was 4:40 to 4:50 [p.m.], so [twenty] minutes and [ten] minutes." The first extracted portion captured an individual appearing to be defendant in a store, and the second extracted portion captured an individual appearing to be defendant on the playground with his daughter. The remaining Oakcrest Estates video footage that Dougherty did not direct Paley to extract was destroyed. Johannessen explained that once everything evidential is extracted, the remaining video is deleted and the hard drive "gets put back in service" for use in future cases.

Defendant did not testify but his recorded statement was played at trial. He also relied on the testimony of several of the State's witnesses and cell phone records to corroborate his alibi defense that he was in Mays Landing rather than Atlantic City at the time of the shooting, along with evidence regarding the time and distance between the two locales. The jury ultimately convicted defendant of all charges. This appeal followed.

II.

We first address defendant's contention that the trial court erred in denying his pre-trial and post-trial motions to dismiss the indictment based on the State's destruction of the bulk of the Oakcrest Estates surveillance footage. Specifically, defendant

argues that: the New Jersey Constitution does not require a showing of bad faith with respect to the destruction of evidence; the trial court erred in not finding the State acted in bad faith; and the permissive adverse inference instruction the court gave the jury was insufficient to cure the harm caused by the destruction of the surveillance video.

A.

The trial court conducted an evidentiary hearing on defendant's pre-trial motion to dismiss the indictment. In ruling on the motion, the court analyzed the three factors bearing upon whether the destruction of physical evidence amounts to a due process violation, as identified in State v. Hollander, 201 N.J. Super. 453, 479 (App. Div.), certif. denied, 101 N.J. 335 (1985).

With respect to the first factor, the court:

> found it disappointing and unacceptable that nobody seems to know what the policy is for discovering evidence from the [ACPO][,] . . . or even where it would be other than on a vast database somewhere . . . . Why was that an important thing for me to understand? Because, if I had determined that there was such a policy and it had been violated, then . . . it would be [] easier to find bad faith or connivance which was a very material thing for me to try to find in undertaking this Hollander analysis.

The court continued, "[t]here is no standard operating procedure that was known to anybody who was involved in this case on the

prosecutor's side" "regarding maintenance of evidence and turning over evidence to the defense in a murder trial, . . . the most serious of cases that could be brought in Superior Court of New Jersey." "So a decision was made by the line detective, who . . . testified honestly that she reviewed [the video] and she made the call. I don't think she should have made the call."

Despite recognizing the improper destruction of the video evidence, the trial court found Dougherty was a "well-meaning detective," and ultimately concluded the destruction was not done in bad faith:

> [A]t the very least, [] there should be some involvement by an attorney who understands . . . the legal responsibilities, not the crime-fighting responsibilities. . . . [Dougherty] indicated herself she did what she was told, and her superior told her pull out what's relevant and repurpose the hard drive. [] [I]n this case, repurposing means destroy[.] . . . The evidence in this case was destroyed. [] I cannot find, however, based upon the testimony . . . and [after] thinking about it for a long time, [that there was] bad faith or connivance on the part of the State . . . , but I'm not satisfied with what happened, and I am going to balance the scales of justice.

With respect to the second factor, the court found "the evidence that was in this case destroyed was sufficiently material to the defense as the second Hollander criteria. It should have been turned over to the defense. I find it difficult to believe

that it was not turned over to the defense." The court noted "[t]his is not a minor issue, this is a major issue, and in this case [the ACPO] failed to fulfill their responsibility."

Turning to the third prong of the Hollander test, the court determined that defendant was prejudiced by the State's destruction of the video evidence:

> Dougherty testified she didn't [see all 215-and-a-half hours of tape], and . . . if she did, . . . it would [have] taken her [twenty-seven] eight-hour[] days to review all that material. She explained [that] . . . she could review multiple cameras with . . . one video screen [but] . . . if you have five or [ten] [] cameras going at a time, how much are you able to concentrate on any one object? . . . [U]nfortunately we'll never know. We will never know what was on those tapes other than the [thirty] or [forty] minutes that [were] produced by the State [to] [defense counsel] []. He's not satisfied with it. I'm certainly not satisfied with it either.

After concluding that the destroyed evidence was material, and that its destruction prejudiced defendant, the trial court next considered the appropriate remedy:

> I don't think it's appropriate for me to dismiss a murder indictment. There are demands of justice on the other side, too . . . [T]here's been a murder[,] which is the most grievous crime [] anyone [] could [] commit[] against the people of the State of New Jersey[.] . . . [Defendant] was indicted for that murder, [so] he's going to stand trial for that murder.

The court continued, "given the discovery violation that I find as a matter of fact has been committed by the [ACPO] in this case, I think I have to right the scales of justice, and I think that" the "extreme remedy" of an adverse inference charge "gives me a [] way to do it." "It's an extreme remedy that is below the remedy of [dismissal], . . . but it is a remedy that's a very potent remedy for the defense. An adverse inference charge is a remedy to balance the scales of justice, even outside the realm of a discovery violation."

Consequently, the court granted defendant's alternative motion for an adverse inference instruction. In its final charge, the court instructed the jury as follows:

> You have heard testimony that the [ACPO] destroyed and failed to preserve video surveillance footage from Oakcrest Estates consisting of [twelve] hours each for [sixteen] cameras as well as approximately [twenty-three] hours, [thirty] minutes from another two cameras, spanning the approximate hours of [twelve] noon to [twelve] midnight on August 26, 2012. Under our court rules, the prosecutor has a duty to produce to the defense evidence in its possession following the return of the indictment. If you find that the State has destroyed and failed to preserve evidence in its possession following the return of the indictment, then you may draw an inference unfavorable to the State which in itself may create a reasonable doubt as to [] defendant's guilt. In deciding whether to draw this inference, you may consider all the evidence in the case, including any explanation given as to the

> circumstances under which the evidence was destroyed. In the end, however, the weight to be given to the destruction of the evidence is for you and you alone to decide.

The court also gave the jury a similar instruction during the testimonial phase of the case.

The court also denied defendant's post-trial motion to dismiss the indictment. The court again concluded: "I do not find evidence of bad faith, such as would enable me [to] . . . overturn" "a unanimous verdict by a duly constituted and selected jury of people from Atlantic County, after two adverse inference charges found [defendant] guilty of first-degree murder."

B.

The State is obliged by due process to disclose exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963). A Brady violation occurs when the prosecution suppresses evidence that is both material and favorable to the defense. State v. Martini, 160 N.J. 248, 268 (1999). "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" State v. Robertson, 438 N.J. Super. 47, 67 (App. Div. 2014), certif. granted, 221 N.J. 287 (2015) (quoting State v. Knight, 145 N.J. 233, 246 (1996)). "When the evidence withheld is no longer

available, to establish a due process violation a defendant may show that the evidence had 'an exculpatory value that was apparent before [it] was destroyed' and that 'the defendant would be unable to obtain comparable evidence by other reasonably available means.'" State v. Mustaro, 411 N.J. Super. 91, 102 (App. Div. 2009) (quoting California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984)). Suppression of exculpatory evidence violates due process regardless of whether the prosecutor acted in bad faith. Knight, supra, 145 N.J. at 245.

However, a different standard applies to evidence that is only potentially useful. "Without bad faith on the part of the State, 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" George v. City of Newark, 384 N.J. Super. 232, 243 (App. Div. 2006) (quoting Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988)); see also State v. Marshall, 123 N.J. 1, 109 (1991) (applying Youngblood bad faith standard); Mustaro, supra, 411 N.J. Super. at 103. Where evidence has been destroyed, the court must focus on "(1) whether there was bad faith or connivance on the part of the government, (2) whether the evidence . . . was sufficiently material to the defense, [and] (3) whether [the] defendant was prejudiced by the loss or destruction of the

evidence." Hollander, supra, 201 N.J. Super. at 479 (internal citations omitted).

Defendant urges us to dispense with the bad faith requirement, citing the view of some other states and a minority on the United States Supreme Court. However, our Supreme Court follows the bad faith requirement set forth in Youngblood. See Marshall, supra, 123 N.J. at 109; Mustaro, supra, 411 N.J. Super. at 103 n.4 (declining to follow, based on New Jersey Supreme Court precedent, other jurisdictions that have determined that proof of bad faith is not required by the State constitutions). We are bound by the decision of our Supreme Court.

Applying these principles, we discern no due process violation. First, defendant has not demonstrated that the erased portion of the video had exculpatory value that was apparent before it was destroyed. Nor has defendant met his burden to establish bad faith. Youngblood, supra, 488 U.S. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. Our courts have held that the routine destruction of video or other data does not establish bad faith. See State v. Reynolds, 124 N.J. 559, 569 (1991) (no bad faith where police destroyed tapes of police radio broadcast to arresting officer); Robertson, supra, 438 N.J. Super. at 72 (no bad faith where data routinely erased due to "firmware bug"); Mustaro, supra, 411 N.J. Super. at 104 (reuse of video in accord with departmental

procedures ninety days after arrest did not indicate bad faith); see also Trombetta, supra, 467 U.S. at 488, 104 S. Ct. at 2533, 81 L. Ed. 2d at 421-22 (finding no due process violation where California authorities routinely failed to preserve breath samples but did so in "good faith and in accord with their normal practice").

Moreover, the fact that a discovery request was made prior to the routine destruction of evidence does not compel a finding of bad faith. See Illinois v. Fisher, 540 U.S. 544, 548, 124 S. Ct. 1200, 1202, 157 L. Ed. 2d 1060, 1066 (2004) ("We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of the police.") (citation omitted). There is no evidence of "official animus toward [defendant] or [] a conscious effort to suppress exculpatory evidence." Trombetta, supra, 467 U.S. at 488, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. We therefore conclude that defendant has failed to demonstrate a due process violation.

This, however, does not end our analysis. In addition to the dictates of due process, our discovery rules impose obligations upon the State to preserve and produce evidence to a defendant. See R. 3:13-3. Particularly in view of the State's awareness of the defense request and the potential relevance of the video footage, the State was required to preserve the evidence at least

until its decision not to disclose the remaining footage was adjudicated. The State is generally not free to destroy discoverable evidence post-complaint. See State v. Dabas, 215 N.J. 114, 138 (2013) (holding that post-indictment destruction of an officer's interview notes violated Rule 3:13-3); see also State v. Hunt, 184 N.J. Super. 304, 306 (Law Div. 1981).

Having concluded that the State was not at liberty to destroy the video, we turn to the question of remedy. The court may order a party that has failed to comply with Rule 3:13-3 "to permit the discovery of materials not previously disclosed, grant a continuance or delay during trial, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate." R. 3:13-3(f). The court has broad discretion to determine the appropriate sanction. Marshall, supra, 123 N.J. at 134.

Dismissal of an indictment is a harsh remedy that should be sparingly employed. See State v. Murphy, 110 N.J. 20, 35 (1988). In lieu of dismissal, a court may provide the jury with an adverse-inference charge. See Dabas, supra, 215 N.J. at 140—41. We conclude the trial court properly imposed that remedy here.

Defendant contends that, due to the egregiousness of the police conduct, the court should have issued a stronger instruction directing the jurors to draw a negative inference against the

State, rather than merely permitting them to do so. However, we discern no abuse of discretion in the court's permissive inference charge. See Dabas, supra, 213 N.J. at 140 n.12 (holding that permissive inference should be given when police destroy their notes); see also Model Jury Charge (Criminal), Statements of Defendant (When Court Finds Police Inexcusably Failed To Electronically Record Statement) (instructing that "the absence of an electronic recording permits but does not compel [the jury] to conclude that the State has failed to prove that a statement was in fact given and if so, was accurately reported by State's witnesses.").

III.

Defendant next argues that the prosecutor used racially and religiously discriminatory peremptory challenges to strike three African-Americans from the panel during jury selection. Defendant further contends that the trial court failed to engage in the three-step analysis required by State v. Osorio, 199 N.J. 486, 504 (2009), to assess whether a constitutional violation resulted. We find no merit in these contentions.

The United States and New Jersey Constitutions both prohibit the prosecution and defense counsel from exercising peremptory challenges of jurors in a way that discriminates on the basis of race or religion. Batson v. Kentucky, 476 U.S. 79, 96, 106 S. Ct.

1712, 1723, 90 L. Ed. 2d 69, 87-88 (1986); State v. Gilmore, 103 N.J. 508, 522-23 (1986); State v. Fuller, 182 N.J. 174, 197 (2004). Where a defendant establishes a prima facie showing that the challenges are being exercised on constitutionally impermissible grounds, Gilmore, supra, 103 N.J. at 517, 535-36, the burden then shifts to the State to demonstrate "evidence that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias[,]" id. at 537, that is, something "'reasonably relevant to the particular case on trial or its parties or witnesses[.]'" Id. at 538 (quoting People v. Wheeler, 583 P.2d 748, 765 (Cal. 1978)).

Assuming the State advances such non-discriminatory reasons, as a third step of the analysis, the court must then "determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds of presumed group bias." Id. at 539. Accord Osorio, supra, 199 N.J. at 505-06; State v. Pruitt, 430 N.J. Super. 261, 269-71 (App. Div. 2013) (quoting Gilmore, supra, 103 N.J. at 539). Among other things, the court must assess whether the State has applied the proffered reasons "even-handedly to all prospective jurors"; the "overall pattern" of the use of peremptory challenges; and "the composition of the jury ultimately selected to try the

case." Osorio, supra, 199 N.J. at 506 (quoting State v. Clark, 316 N.J. Super. 462, 473-74 (App. Div. 1998), appeal after remand, 324 N.J. Super. 558 (App. Div. 1999), certif. denied, 163 N.J. 10 (2000)).

In the present case, during jury selection, the trial court sua sponte asked the prosecutor to explain his decision to excuse another African-American juror. The record reflects that the first challenged juror "was a social worker." The second such juror was friendly with members of defendant's family, including the mother of defendant's daughter, and was "a case worker at the Atlantic County Welfare Office." Finally, the third juror struck by the prosecutor stated during voir dire that "her daughter's father is in prison for the rest of his life," her niece was on probation, and that she worked as a property manager and also served as a minister at her church. Apparently satisfied with the prosecutor's explanation, the judge inquired of defense counsel, "is there anything you want to ask?" Defense counsel responded, "Not at this time, Judge."

We conclude from our review of the record that defendant failed to fulfill his step one obligation to make "a prima facie showing that the peremptory challenges [were] exercised on the basis of race[.]" Osorio, supra, 199 N.J. at 492. Even if defendant did so, the prosecutor proffered sufficient non-

discriminatory reasons for the challenges, and defendant posed no objection nor sought further explanation. Accordingly, the court was not required to proceed to the third stage of the Osorio analysis. Moreover, with respect to the third juror, whose position as a minister underlies defendant's religious discrimination claim, her relatives' experiences with the criminal justice system might well lead a reasonable prosecutor to believe the juror "would be disposed to favor the defense." See Fuller, supra, 182 N.J. at 202. Accordingly, we discern no constitutional violation.

IV.

Defendant next argues that the identification procedure employed by the State was impermissibly suggestive and that the resulting witness identifications should have been excluded. Specifically, defendant contends that: (1) by simply showing Jones, Ceasar, and Brown a single photograph of defendant, the State failed to adhere to the Attorney General Guidelines;[3] and (2) the court erred in prematurely concluding the pretrial hearing on the admissibility of the eyewitness identifications without testimony from those witnesses regarding the estimator variables.

[3] Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

Alternatively, defendant argues the trial court erred in failing to provide the jury with an instruction on identification that explained all relevant system and estimator variables.

When reviewing an order denying a motion to bar an out-of-court identification, our standard of review "is no different from our review of a trial court's findings in any non-jury case." State v. Wright, 444 N.J. Super. 347, 356 (App. Div.) (citing State v. Johnson, 42 N.J. 146, 161 (1964)), certif. denied, ___ N.J. ___ (2016). We accept those findings of the trial court that are "supported by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014) (citing State v. Elders, 192 N.J. 224, 243 (2007)). Deference should be afforded to a trial judge's findings when they are "substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, supra, 42 N.J. at 161. However, "[a] trial court's interpretation of the law . . . and the consequences that flow from established facts are not entitled to any special deference." Gamble, supra, 218 N.J. at 425 (citing State v. Gandhi, 201 N.J. 161, 176 (2010); Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Consistent with State v. Henderson, 208 N.J. 208, 289 (2011), a court should suppress identification evidence only if it finds

"from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification[.]" The Court in Henderson cautioned that, though it had revised the framework for analyzing the reliability of out-of-court identifications, it fully expected that, "in the vast majority of cases, identification evidence will likely be presented to the jury. The threshold for suppression remains high." Id. at 303. The Court also pointed out that this analysis it was endorsing "avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake." Ibid.

Under prior law, there was a two-step test for determining the admissibility of identification evidence; it required the court to decide whether the identification procedure in question was impermissibly suggestive and, if so, whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." State v. Madison, 109 N.J. 223, 232 (1988) (quoting Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968)). To assess reliability, the Court considered five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of

certainty demonstrated at the time of the confrontation; and (5) the time between the crime and confrontation. Id. at 239-40. These reliability factors were then balanced against the "corrupting effect" of the suggestive identification. Henderson, supra, 208 N.J. at 238 (quoting Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)).

In Henderson, the Court relied upon current social science research and studies to expand the number of factors informing the reliability of identification evidence and to provide trial courts guidance and explanation as to how to analyze those factors. Specifically, the court identified eight "system variables," defined as characteristics of the identification procedure over which law enforcement has control. Id. at 248-61. These variables are: (1) whether a "blind" or "double-blind" administrator is used; (2) whether pre-identification instructions are given; (3) whether the lineup is constructed of a sufficient number of fillers that look like the suspect; (4) whether the witness is given feedback during or after the procedure; (5) whether the witness is exposed to multiple viewings of the suspect; (6) whether the lineup is presented sequentially versus simultaneously; (7) whether a composite is used; and (8) whether the procedure is a "showup." Ibid.

The Court also identified ten "estimator variables," defined as factors beyond the control of law enforcement which relate to the incident, the witness, or the perpetrator. Id. at 261. These variables are: (1) the stress level of the witness when making the identification; (2) whether a visible weapon was used during the crime; (3) the amount of time the witness viewed the suspect; (4) the lighting and the witness's distance from the perpetrator; (5) the witness's age; (6) whether the perpetrator wore a hat or disguise; (7) the amount of time that passed between the event and the identification; (8) whether the witness and perpetrator were different races; (9) whether the witness was exposed to co-witness feedback; and (10) the speed with which the witness makes the identification. Id. at 261-72.

Henderson prescribed a four-step procedure for determining admissibility of identification evidence. Id. at 288-89. First, to obtain a hearing, defendant has the burden of producing some evidence of suggestiveness, tied to a system rather than estimator variable, that could lead to a mistaken identification. Ibid. Second, the State must offer proof the identification is reliable, "accounting for system and estimator variables[.]" Id. at 289. Third, the burden remains on the defendant "to prove a very substantial likelihood of irreparable misidentification." Ibid. And, fourth, if defendant sustains his burden, the identification

evidence should be suppressed; if defendant does not sustain his burden, the evidence should be admitted with "appropriate, tailored jury instructions[.]" Ibid.

In the present case, the trial court granted a hearing based on the fact the eyewitnesses were shown only a single photograph of defendant. Dougherty testified at the hearing that the three witnesses named defendant as the shooter before being shown his photo, and all knew him prior to the shooting. After hearing Dougherty's testimony and viewing recordings of the identifications, the court found "defendant's allegation of improper suggestiveness . . . groundless." The court concluded that "defendant has not demonstrated any likelihood whatsoever of irreparable misidentification[.]"

The record here contains compelling facts that defeat defendant's claim that the out-of-court show-up of defendant's photo resulted in a very substantial likelihood of irreparable misidentification. Brown knew defendant "for awhile" and the two had been incarcerated together. Like Brown, Ceasar knew defendant for "several years." Jones was also acquainted with defendant and had seen him at the Carver Hall Apartments on multiple occasions in the two or three months prior to the shooting. When shown defendant's photograph, all three witnesses identified defendant almost immediately and were confident in their identifications.

A cursory review of the Henderson estimator variables reveals that most address identification of a perpetrator who is a stranger to the witness, based on the witness's observation of the perpetrator during the often-brief criminal event. Id. at 261-72. The majority of the estimator variables have little or no application when the witness knows the suspect from previous dealings and can identify the person based upon those prior contacts. Under these circumstances, where the three eyewitnesses were well familiar with defendant, we conclude the identification procedure used did not result in a "very substantial likelihood of irreparable misidentification." Id. at 289. See, e.g., State v. Herrera, 187 N.J. 493, 507, 509 (2006) (finding "significant, if not controlling" in admissibility of identification evidence derived from suggestive showup procedure, the fact the witness "had seen defendant on a daily basis in the month prior to the incident").

Contrary to defendant's argument, the trial court reasonably exercised its discretion to terminate the hearing after it heard Dougherty's testimony and viewed the recorded identifications. "[T]he court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless." Henderson, supra, 208 N.J. at 289. We likewise discern no error in the court's jury instruction on identification,

which was "appropriate[ly] tailored" to reflect the circumstances of the identifications. Ibid.

V.

Having reviewed the record, we conclude the arguments raised in Points V, VI, and VII of defendant's brief lack sufficient merit to warrant extended discussion. R. 2:11-3(e)(2). We add only the following limited comments.

For the first time on appeal, defendant argues in Point V that his confrontation rights and the hearsay rules were violated by the admission of statements made by police during their questioning of defendant that other persons, who were not produced at trial, identified defendant as the shooter. Although under the plain error rule we will consider allegations of error not brought to the trial court's attention that have a clear capacity to produce an unjust result, see Rule 2:10-2; State v. Macon, 57 N.J. 325, 337-39 (1971), we otherwise generally decline to consider issues that were not presented at trial. State v. Robinson, 200 N.J. 1, 19 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

As noted, defendant's present argument regarding statements made by police during his questioning was not raised before the trial court and accordingly we need not review it. Nevertheless, addressing the merits of the argument, we conclude defendant has

not met his burden of showing that the admission of the challenged remarks produced an unjust result. The statements of the investigators who interviewed defendant were not offered or admitted for the purpose of proving that others inculpated defendant. Rather, as defendant acknowledges, the officers' statements were part of a "proper interrogation technique" aimed at securing his confession.

In Point VI of his brief, defendant argues that the prosecutor committed misconduct during his closing argument by commenting on defendant's post-arrest silence and "failure" to present evidence proving his innocence. The State responds that the prosecutor simply commented on the pledge made during defense counsel's opening statement that he would prove defendant's innocence. The State further maintains that the prosecutor's remaining comments were not directed to defendant's silence but rather to his lack of credibility in responding to the investigators' inquiries.

To warrant reversal, prosecutorial misconduct during summation must be "so egregious that it deprived defendant of a fair trial." State v. Swint, 328 N.J. Super. 236, 261 (App. Div.) (citing State v. Feaster, 156 N.J. 1, 59 (1998)), certif. denied, 165 N.J. 492 (2000). A reviewing court should not hesitate to reverse a conviction where "the prosecutor in his [or her] summation over-stepped the bounds of propriety and created a real

danger of prejudice to the accused." State v. Smith, 167 N.J. 158, 178 (2001) (quoting State v. Johnson, 31 N.J. 489, 511 (1960)). However, a prosecutor's comments during summation should not be reviewed in a vacuum, rather, they must be considered "in the context of the trial as a whole[.]" Swint, supra, 328 N.J. Super. at 261.

A prosecutor is entitled to significant latitude in the content of his or her closing arguments. State v. Frost, 158 N.J. 76, 82 (1999). The prosecutor may "be forceful and graphic" in the arguments presented to the jury. State v. DiPaglia, 64 N.J. 288, 305 (1974). Likewise, the prosecutor "may suggest legitimate inferences to be drawn from the record, but [he] commits misconduct when [he] goes beyond the facts before the jury." State v. Harris, 156 N.J. 122, 194 (1998).

Here, in his opening statement, defense counsel stated to the jury:

> I'll tell you this: The defense will prove that [defendant] is innocent. We don't have to, we shouldn't have to, but here we are today and he's on trial for a murder he didn't commit. We don't have to prove it, but we will. And, you know, I don't say that lightly. That's a big promise I'm making to you, and I got to hope I fulfill it for my client's sake, for a man who's on trial for a murder he did not commit.

In his summation, the prosecutor responded:

> Now, [defense counsel] is absolutely right. He does not have to prove a single thing to you, but he said he would. He said in the beginning he was going to prove his client was innocent, his client was not in Atlantic City on that day. So what does he do? Well, he takes out a lot of cell phone records, and [defense counsel] is very technologically savvy. He knows all the terms for the cell phone records, he knows all the terms for the text messages, and he says, [] look at these texts, look at these cell phone records, but he doesn't prove a thing. He doesn't have to, but he didn't. Absolutely no evidence was put forward in this case to prove that [defendant] was anywhere but Atlantic City murdering James Jordan.

Viewed as a whole, the prosecutor's comments did not impermissibly shift the burden of proof to defendant to prove his alibi. Rather, the comments represented a direct response to the promise defense counsel made in his opening statement that defendant would prove his innocence. See e.g., State v. Smith, 212 N.J. 365, 404 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013) ("an appellate court will consider whether the offending remarks were prompted by comments in the summation of defense counsel"). Further, "[a] prosecutor's otherwise prejudicial arguments may be deemed harmless if made in response to defense arguments." State v. McGuire, 419 N.J. Super. 88, 145 (App. Div.), certif. denied, 208 N.J. 335 (2011).

Moreover, "prompt[] and effective[]" instructions have the ability to neutralize prejudice engendered by an inappropriate

comment or piece of testimony. State v Wakefield, 190 N.J. 397, 440 (2007), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008). In its final charge, the judge instructed the jury that defendant had no obligation to prove his alibi:

> [D]efendant, as part of his denial of guilt, contends that he was not present at the time and place that the crime was allegedly committed, but was somewhere else and therefore could not possibly have committed or participated in the crime. Where a person must be present at the scene of the crime to commit it, the burden of proving [] defendant's presence beyond a reasonable doubt is upon the State. [] [D]efendant has neither the burden nor the duty to show that he was somewhere else at the time and so could not have committed the offense. You must determine, therefore, whether the State has proved each and every element of the offense charged, including that of [] defendant's presence at the scene of the crime and his participation in it.

"We presume that the jury faithfully follow[s] [the court's] instruction[s.]" State v. Miller, 205 N.J. 109, 126 (2011).

We likewise reject defendant's contention that the prosecutor improperly commented on his post-arrest silence. Rather, taken in context, the prosecutor's comments focused on defendant's vague and inconsistent responses to various questions posed during his questioning, which, the State argued, reflected his lack of credibility.

In his final argument challenging his conviction, defendant asserts that the cumulative effect of the errors denied him due process and a fair trial. However, we are satisfied that none of the errors alleged by defendant, individually or cumulatively, warrant reversal of his conviction or the granting of a new trial. State v. Orecchio, 16 N.J. 125, 129 (1954).

VI.

Defendant also challenges his sentence. He argues that, in imposing sentence, the court improperly double-counted the victim's death in finding aggravating factors one and two. The State agrees that those aggravating factors are not supported by the record, but nonetheless urges us to affirm defendant's sentence.

At defendant's sentencing hearing, the court found aggravating factors one, the nature and circumstances of the offense (N.J.S.A. 2C:44-1(a)(1)); two, the gravity of harm to the victim (N.J.S.A. 2C:44-1(a)(2)); three, the risk defendant will commit another offense (N.J.S.A. 2C:44-1(a)(3)); six, defendant's prior record (N.J.S.A. 2C:44-1(a)(6)); and nine, the need for deterrence (N.J.S.A. 2C:44-1(a)(9)). The court found no mitigating factors. Pertinent to this appeal, the court made the following findings regarding aggravating factors one and two:

> First, the [c]ourt [] finds that there was aggravating factor one and that this is the single most important factor. While ordinarily the death of the victim cannot be used as an aggravating factor, the [c]ourt can, however, consider that . . . there was a weapon used in this offense. Therefore, the fact that [] defendant shot and killed [the victim] in cold blood is . . . an appropriate aggravating factor.
>
> Second, the [c]ourt finds also aggravating factor two. [] [D]efendant's actions led to the death of the victim. Here, defendant fired a single shot into [the victim]'s body. The bullet traveled through his arm into his chest and into his lungs, ultimately ending his life.

We review sentencing determinations for abuse of discretion. State v. Robinson, 217 N.J. 594, 603 (2014) (citing State v. Roth, 95 N.J. 334, 364-65 (1984)). For each degree of crime, N.J.S.A. 2C:43-6(a) sets forth "sentences within the maximum and minimum range." Roth, supra, 95 N.J. at 359. The sentencing court must "undertake[] an examination and weighing of the aggravating and mitigating factors listed in [N.J.S.A.] 2C:44-1(a) and (b)." Ibid.; State v. Kruse, 105 N.J. 354, 359 (1987). "'[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range.'" State v. Fuentes, 217 N.J. 57, 73 (2014) (quoting State v. Natale, 184 N.J. 458, 488 (2005)). Furthermore, "[e]ach factor

found by the trial court to be relevant must be supported by 'competent, reasonably credible evidence'" in the record. Id. at 72 (quoting Roth, supra, 95 N.J. at 363).

We accord deference to the sentencing court's determination. Fuentes, supra, 217 N.J. at 70 (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)). We must affirm defendant's sentence unless

> (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
>
> [Ibid. (quoting Roth, supra, 95 N.J. at 364-65).]

We will remand for resentencing if the sentencing court fails to provide a qualitative analysis of the relevant sentencing factors, ibid. (citing Kruse, supra, 105 N.J. at 363), or if it considers an inappropriate aggravating factor. Ibid. (citing State v. Pineda, 119 N.J. 621, 628 (1990)).

Aggravating factor one requires consideration of "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner[.]" N.J.S.A. 2C:44-1(a)(1). When assessing whether this factor applies, "the sentencing court reviews the severity of the defendant's crime, 'the single most

important factor in the sentencing process,' assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public." State v. Lawless, 214 N.J. 594, 609 (2013) (quoting State v. Hodge, 95 N.J. 369, 378-79 (1984)). The court may also consider "'aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.'" Fuentes, supra, 217 N.J. at 75 (quoting State v. Henry, 418 N.J. Super. 481, 493 (Law Div. 2010)). In determining whether a defendant's conduct was "'especially heinous, cruel, or depraved,' a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Id. at 74-75; see also State v. Yarbough, 100 N.J. 627, 645 (1985).

Defendant correctly asserts that the trial court engaged in impermissible double-counting. Defendant's act of firing a single shot did not "extend[] to the extreme reaches of the prohibited behavior." Fuentes, supra, 217 N.J. at 75 (quoting Henry, supra, 418 N.J. Super. at 493). Likewise, the gravity of harm to the victim, i.e., death, is itself an element of first-degree murder. Since the court erred in finding aggravating factors one and two, we remand for reconsideration of defendant's sentence in the absence of those aggravating factors.

Defendant's conviction is affirmed. We remand for the court to resentence defendant without consideration of aggravating factors one and two.